

**NO. PD-0921-18**

**IN THE COURT  
OF CRIMINAL APPEALS  
OF TEXAS**

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COURT OF CRIMINAL APPEALS  
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**MICHAEL J. BUCK**

**APPELLANT**

**V.**

**THE STATE OF TEXAS**

**APPELLEE**

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**THE STATE'S BRIEF**

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**ON PDR FROM CAUSE NUMBER 08-16-00294-CR  
IN THE COURT OF APPEALS, EIGHTH DISTRICT OF TEXAS**

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## **STATEMENT OF THE CASE**

Appellant, Michael J. Buck (hereinafter Buck), was convicted of two counts of aggravated sexual assault on September 19, 2016, upon his plea of guilty to the trial court. (CR: 8-9, 118-19; RR2: 23, 40).<sup>1</sup> The next day, on September 20, 2016, after a hearing on punishment, the trial court assessed punishment at 23 years' confinement in the Texas Department of Criminal Justice – Institutional Division. (CR: 118-19; RR2: 40-128).

On October 13, 2016, Buck timely filed a motion for new trial. (CR: 146-51). That motion was overruled without hearing on October 17, 2016. (CR: 156). Notice of appeal was timely filed on October 28, 2016. (CR: 163). The trial court entered a certification concerning Buck's appeal, but only certified that there was no plea bargain in the case, and scratched out that the defendant had the right to appeal and initialed that scratch out. (CR: 131).

On August 2, 2018, the Eighth Court of Appeals affirmed Buck's convictions. *Buck v. State*, No. 08-16-00294-CR, 2018 WL 3654916 (Tex.App. – El Paso August 2, 2018, pet. granted)(not designated for publication). Buck's PDR was granted December 5, 2018, without allowing oral argument.

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<sup>1</sup> Throughout this brief, references to the record will be made as follows: clerk's record, "CR" and page number; reporter's record, "RR" and volume and page number; exhibits, "RR" and volume number followed by "SX" or "DX" and exhibit number.

## **STATEMENT OF FACTS**

### **1. Article 28.01 hearing**

A 28.01<sup>2</sup> hearing was held on August 31, 2016. Buck's medical issues were discussed, with the judge finally stating he would address the matter later. (RR2: 18-19).

The judge asked Buck's lawyer if she had any other matters to address, and she responded, "I had filed a notice of insanity, and the Court had had my client evaluated, and I just got a copy of the report." (RR2: 19). The judge asked her if there was anything else, and she stated: "That's it." (RR2: 19). The State had nothing to be addressed. (RR2: 19). Nothing was said about a punishment election. (RR2: 19). The proceedings concluded. (RR2: 19).

### **2. The guilty plea**

On September 19, 2016, the case was called for jury trial. (RR2: 23). Buck's lawyer made arrangements with the judge for another lawyer to assist her with jury selection. (RR2: 23). Counsel stated to the judge that Buck wanted to plead guilty and asked the judge to consider allowing Buck to do that. (RR2: 23-24). The judge replied that he could not stop Buck from pleading guilty. (RR2: 24). Buck's counsel noted that the State's offer had gone to 10 years' confinement

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<sup>2</sup> See TEX. CODE CRIM. PROC. art. 28.01 (regarding hearing and determination of numerous pre-trial matters).

the week before trial and asked if the judge was open to that sentence or could give some guidance. (RR2: 24). The judge responded that if Buck was coming to the court for punishment, it was an open plea, and he was not going to commit himself beforehand: “He pleas, it’s an open plea.” (RR2: 24). Counsel responded that Buck had agreed to an open plea, saying, “he would do that,” but she also stated that she would reconfirm with Buck. (RR2: 24, 26). Counsel for Buck reminded the judge that she had filed a formal motion to withdraw, and the judge responded that he entered a formal order denying the motion. (RR2: 24-25).

The judge followed up and inquired if Buck was going to enter an open plea of guilty, and Buck’s counsel again affirmed that those were his instructions to her, but she wanted to reconfirm that with him when he arrived for trial. (RR2: 26). The judge responded that if that was not Buck’s decision, they would pick a jury and go to trial: “[H]e’s getting resolved one way or the other.” (RR2: 26).

Once Buck was present for trial, the judge inquired whether he was going to enter an open plea of guilty, to which Buck responded that he wanted to go to trial and defend himself. (RR2: 26-27). The judge told Buck that the jury panel had been used on another case, so Buck’s trial would be continued until Friday. (RR2: 27). The judge told Buck that he had denied his lawyer’s motion to withdraw and asked Buck’s counsel to explain consecutive sentencing to Buck, as there was a

two-count indictment. (RR2: 27). The record shows that counsel conferred with Buck as instructed. (RR2: 28).

The judge asked Buck if he had understood his lawyer's explanation of consecutive sentencing, commonly known as stacking. (RR2: 28). Buck stated that he did. (RR2: 28).

The judge told Buck that he had an absolute right to represent himself, but would have his lawyer act as stand-by counsel available to him. (RR2: 28). The judge also explained that if he decided to represent himself, he would be held to the same standard as lawyers and proceeded to give Buck his *Faretta*<sup>3</sup> self-representation warnings. (RR2: 28-29). Buck complained about his lawyer's representation. (RR2: 29-30). The judge responded that Buck was looking at 5-99 years' confinement on each count, and since he had not elected for the jury to assess punishment, he (the judge) would assess punishment on each count and decide whether to stack the sentences or not. (RR2: 30).

The judge asked Buck's counsel if the complainant knew Buck and if she was going to testify that Buck assaulted her. (RR2: 30). Counsel replied that, according to the prosecutor, the complainant was prepared to come in. (RR2: 31).

The following exchange followed between the judge and Buck:

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<sup>3</sup> *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975).

[THE COURT]: Okay. Mr. Buck, understand, I don't know if she's telling the truth or she isn't. I'm merely telling you what the State anticipates she's going to say. If the jury doesn't believe her, good for you. If they do believe her, you have a problem because I am going to sentence you.

[THE DEFENDANT]: Well, in that case, Your Honor, I'd like to go ahead and take the open plea because I thought that the jury would have the right to assess the punishment.

[THE COURT]: No, sir. You are mistaken. The jury will tell you guilty or not guilty, count 1; guilty, not guilty count 2.

[THE DEFENDANT]: All right. Then may I go ahead and plea – an open plea, sir?

(RR2: 31). There was a further colloquy between Buck's counsel, the prosecutor, and the judge about how long the five-year plea offer was good for, with Buck's counsel stating that she did not know the 28.01 hearing was the deadline for the five-year offer to be taken and asked the judge to consider that. (RR2: 31-32). The judge read into the record that the five-year offer was in effect through the bond-reduction hearing, and then no mention of it after that was found in the court records. (RR2: 32). However, the judge let it be known that he was not going to assess five years' confinement on any plea. (RR2: 33).

The following exchange occurred directed to Buck:

[THE COURT]: And I specifically told you, 'You leave today, those five TDC is off the table.' And believe it or not, I wasn't kidding. They're off. So there's no need to talk about five TDC. And I don't want to hear, I'll take my five TDC now. It's too late. There is no five

TDC.

These are your options, Mr. Buck. One, on Friday, we will empanel another jury panel. You will go to trial. Two, I cannot stop you from entering a plea to that jury, but the reality is, I will – if you enter a plea of guilty to the jury, I will instruct them to find you guilty, they will do so, and then you come to me for punishment. So I don't consider that a viable option. Or two [sic], you plea guilty today on what we call an open plea, meaning there is no recommendation from the State of Texas to bind the defense, and I will assess an appropriate punishment.

[THE DEFENDANT]: All right. **I'd like to go ahead and plea to the open plea, sir.**

(RR2: 33-34)(emphasis added).<sup>4</sup> Buck's counsel asked what her role was at that point, so the judge asked Buck if he was proceeding *pro se*, and Buck replied that he was not, so counsel continued representing Buck. (RR2: 34-35). The judge asked Buck one more time if he wanted to proceed with an open plea of guilty, and he stated that that was his understanding, and counsel stated that that was her understanding. (RR2: 35).

After a short recess, the plea was taken. (RR2: 36). Buck was sworn in as a witness. (RR2: 36). Buck was asked to review SX1, the plea papers, (CR: 132-41), and Buck's counsel was asked if she had explained those documents to Buck. (RR2: 36-37). She affirmed that she had and that he understood the documents

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<sup>4</sup> The record does not disclose when, exactly, the judge told Buck that the five-year plea offer was off the table, but presumably it was before the day of trial that turned into an open plea.

and the consequences of giving up the rights detailed therein. (RR2: 36-37).

Buck was asked if he was satisfied with his lawyer's representation, and he replied that he was. (RR2: 37). Buck stated that he had never been found to be incompetent, and his lawyer stated that she believed Buck to be competent to proceed. (RR2: 37). Buck stated that no doctor or psychiatrist had ever found him to be mentally ill. (RR2: 37). The judge, from his observations of Buck and the answers given, found Buck competent. (RR2: 37).

Buck entered his plea of guilty to the two-count indictment and stated that he was doing so freely and voluntarily. (RR2: 38). The State summarized the evidence covering the elements of the allegations of the indictment. (RR2: 38-39). Introduced into evidence were the plea papers, SX1, and SX2, the complaint affidavit, and SX3, the DNA report showing Buck's DNA on the complainant's breast and belly. (RR2: 38-39; CR: 132-41). The judge inquired if there was a plea agreement in the case, to which the prosecutor responded that there was not as to punishment, and that the only agreement was that the State agreed to waive jury trial and Buck, in consideration of that, agreed to waive his appellate rights. (RR2: 39). Buck's counsel agreed that the representation by the prosecutor was correct, and she further stated: "[I] would like to state for the record that I explained to Mr. Buck that by signing these plea papers in this particular

agreement, he understood he was waving his right to appeal in return for the State waiving its right to a jury trial.” (RR2: 39). The judge announced that he accepted Buck’s guilty plea and found him guilty of both counts of aggravated sexual assault. (RR2: 40). The proceedings were recessed until the next day for the hearing on punishment. (RR2: 40).

### **3. The punishment hearing**

The proceedings reconvened the next day, September 20, 2016, for the punishment hearing. (RR2: 40-41). Both the prosecutor and Buck’s counsel made opening statements, and witnesses on the issue of punishment were called. (RR2: 41-115). The evidence at punishment showed that the complainant was age 19 at the time of the punishment hearing on September 20, 2016, and the offense was on February 10, 2016. (RR2: 40, 68-86).

After closing arguments on punishment, (RR2: 124-27), the judge sentenced Buck to 23 years’ confinement in the Institutional Division of the Texas Department of Criminal Justice on each count. (RR2: 127-28). The sentences were not stacked. (RR2: 127-28; CR: 118-19).

### **4. Documents**

On April 12, 2016, the district-court judge entered an order setting the case for a 28.01 hearing on August 31, 2016 (with a notation that all motions had to be

filed seven days prior to that date), and trial on September 16, 2016. (CR: 33).

There is another order entered to the same effect on May 6, 2016. (CR: 44, 46).

There is also in the record an order setting a plea hearing for September 14, 2016, that order being entered on September 7, 2016. (CR: 95). There is then an order cancelling the plea hearing and setting the case for jury trial for September 16, 2016, that order also being entered on September 7, 2016. (CR: 97). Also on September 8, 2016, counsel for Buck filed a motion to withdraw. (CR: 100-01).

The judge entered an order the next day, September 9, 2016, denying the motion to withdraw. (CR: 102).

The plea papers introduced at the open plea will be discussed, *infra*.

## **SUMMARY OF THE STATE'S ARGUMENTS**

(1) Buck voluntarily, knowingly, and intelligently waived his right of appeal by his bargain with the State to waive appeal in exchange for the State's consenting to waiver of jury trial. Because there was a bargained exchange – supported by the record – Buck's appeal waiver was valid and should be enforced. His attempted appeal should be dismissed.

(2) Buck, who was properly admonished under article 26.13 of the Code of Criminal Procedure of all of his rights, was presumed to have entered a voluntary and knowing plea. Buck failed to overcome the heavy burden placed on him to show a lack of voluntariness. The record, in its totality, demonstrates that Buck's open plea of guilty was voluntarily made and was not coerced, such that his convictions should be affirmed.

The judge's incorrect statement that the sentences could be stacked did not imply that he would stack the sentences. He merely stated that that was an option. And, in fact, he did not stack the sentences and sentenced Buck to 23 years' confinement, a reasonable sentence for two sexual-assault offenses at gunpoint.

Moreover, the only evidence in the record, despite Buck's protestations to the contrary, that his plea was involuntary due to the incorrect stacking admonishment is the incorrect admonishment itself. Just saying he would not have

pled guilty but for the incorrect admonishment did not make it so. And his bare claim that he was misled by the incorrect stacking admonishment is all the evidence that Buck provides. That is not evidence that supports a claim of an involuntary plea. Buck had to show that he was misled into pleading guilty and harmed by the inaccurate stacking admonishment, but he failed to do so.

As to election of punishment, *Postell* is still the law and applies to cases like this one where there is a 28.01 hearing requiring the election to be made at that time.

The judge's misstatement that he would assess punishment if Buck pled guilty to the jury did not harm Buck, as there is no showing in the record that the misstatement caused Buck to plead guilty. Buck had to show that he was misled into pleading guilty and harmed by the inaccurate statement, and he has failed to do so.

Buck's confirmations, orally and in writing, on the record that his guilty plea was voluntarily made support the conclusion of the Court of Appeals that his guilty plea was voluntary and that his convictions should be affirmed.

## **STATE’S REPLY TO APPELLANT’S GROUNDS FOR REVIEW**

**BUCK’S BARGAINED-FOR WAIVER OF APPEAL, SUPPORTED IN THE RECORD, SHOULD PREVENT HIS APPEAL. IF THE APPEAL IS ALLOWED, THE RECORD SUPPORTS THE COURT OF APPEALS’ HOLDING THAT HIS GUILTY PLEA WAS VOLUNTARILY MADE.**

### **UNDERLYING FACTS**

During the guilty-plea proceedings, the judge inquired if there was a plea agreement in the case, to which the prosecutor responded that there was not as to punishment, and that the only agreement was that the State agreed to waive jury trial and Buck, in consideration of that, agreed to waive his appellate rights:

“[T]he only agreement to this point is that the State has agreed to waive its right to a jury trial and the defendant, in consideration of that, has agreed to waive his appellate rights.” (RR2: 39). Buck’s counsel agreed that that representation by the prosecutor was correct, and she further stated: “[I] would like to state for the record that I explained to Mr. Buck that by signing these plea papers in this particular agreement, he understood he was waving his right to appeal in return for the State waiving its right to a jury trial.” (RR2: 39).

An inspection of the plea papers signed by Buck, his counsel, and the prosecutor shows that Buck, as part of his guilty plea, agreed as follows: “I have

also been informed of my right to pursue a motion for new trial and/or appeal...After having consulted with my attorney, I do hereby voluntarily, knowingly and intelligently waive my right to pursue a motion for new trial or appeal.” (CR: 136). In that same document, as part of his guilty plea, Buck waived his right to a jury trial, with the consent and approval of the prosecutor: “I hereby waive my right to trial by jury after having obtained the consent and approval of the attorney representing the State of Texas to waive this right prior to entering my plea.” (CR: 136). Later in the plea papers is an express consent to the waiver of jury trial by the prosecutor: “[T]he State of Texas...hereby gives consent and approval for the said Defendant to waive the right to a trial by jury.” (CR: 138, 140).

The judge expressly approved the appeal waiver, finding that Buck understood the consequences of waiving permission to file an appeal and voluntarily, knowingly, and intelligently waived that right. (CR: 141). The judge also found that the prosecutor had consented in writing to Buck’s waiver of jury trial. (CR: 141). Finally, on the certification of Buck’s right to appeal, the judge only certified that this was not a plea-bargain case and expressly crossed out the following language: “[A]nd the defendant has the right of appeal.” (CR: 131).

## **ARGUMENT AND AUTHORITIES**

Buck contends in essence in his three grounds for review that: (1) his waiver of appeal was invalid because it was not bargained for; (2) his guilty plea was coerced by the trial judge misleading him about his inability to elect to have the jury assess his punishment; and (3) his guilty plea was coerced because of the judge's incorrect admonishment on stacking and implying he would stack Buck's sentences if he did not plead guilty. *See* (appellant's brief at 8-32). In his grounds for review, Buck contends that the rejection by the Court of Appeals of all of these contentions was in error. *See* (appellant's brief at 1-2, 8-32). All of Buck's claims are without merit.

### **1. Waiver of right to appeal**

A waiver of the right to appeal made voluntarily, knowingly, and intelligently will prevent a defendant from appealing without the consent of the trial court. *Ex parte Broadway*, 301 S.W.3d 694, 697 (Tex.Crim.App. 2009); *Monreal v. State*, 99 S.W.3d 615, 617 (Tex.Crim.App. 2003). The key component in determining whether the right to appeal is voluntarily, knowingly, and intelligently waived in open-plea cases, where there is no plea bargain as to the punishment to be assessed, is whether there is some kind of bargain between the defendant and the State, not as to the punishment to be assessed, but some kind of

*quid pro quo*. See *Ex parte Broadway*, 301 S.W.3d at 698-99 (holding that a bargain was found in the context of an open plea where the State gave up its right to jury trial and consented to that where the defendant, in return, gave up the right to appeal); cf. *Ex parte Delaney*, 207 S.W.3d 794, 795-800 (Tex.Crim.App. 2006) (appeal was not waived in an open-plea case because there was no bargain for anything between the defendant and the State, such that the right to appeal was not voluntarily, knowingly, and intelligently waived).

In *Ex parte Broadway*, this Court held in that open-plea case that by inducing the State to consent to the waiver of a jury trial by the defendant waiving his right to appeal, which waiver of jury trial the State must consent to be effective, see TEX. CODE CRIM. PROC. art. 1.13(a), a bargain supported by consideration was struck, such that the defendant's right of appeal was voluntarily, knowingly, and intelligently waived. See *Ex parte Broadway*, 301 S.W.3d at 697-99.

Most recently, in *Carson v. State*, 559 S.W.3d 489 (Tex.Crim.App. 2018), this Court reaffirmed what it said in *Broadway* and with clarity held that in order for a waiver of appeal to be valid, the record must show that the State gave up its right to a jury in exchange for the defendant's waiver of his appeal. *Carson*, 559 S.W.3d at 494. When the defendant's waiver is given in exchange for that

consideration by the State it is voluntary, knowing, and intelligent, and thus a valid waiver. *Id.* at 495.

In this case, an open plea, like *Broadway*, and in line with the Court's recent opinion in *Carson*, the prosecutor and Buck's counsel went to great pains to expressly put on the record that the State was waiving its right to trial by jury in exchange for Buck waiving his right of appeal. The bargain reached – a specific bargain of jury-trial waiver for appeals waiver – could not have been more carefully and specifically stated. The plea papers further memorialized the bargain reached. Consequently, Buck voluntarily, knowingly, and intelligently waived his right of appeal by his bargain with the State to waive appeal in exchange for the State's consenting to the waiver of jury trial. *See Carson*, 559 S.W.3d at 494-95; *Ex parte Broadway*, 301 S.W.3d at 697-99.

Additionally, this Court in *Jones v. State*, 488 S.W.3d 801 (Tex.Crim.App. 2016), held that in determining whether a defendant has validly waived his right of appeal pursuant to a plea agreement, the reviewing court should look to the written agreement, as well as to the formal record, to determine the terms of the agreement. *Jones*, 488 S.W.3d at 805. General contract-law principles are applied to determine the intended content of a plea agreement. *Id.* As noted above, an inspection of the plea papers signed by Buck, his counsel, and the prosecutor

shows that Buck, as part of his guilty plea, agreed as follows: “I have also been informed of my right to pursue a motion for new trial and/or appeal...After having consulted with my attorney, I do hereby voluntarily, knowingly and intelligently waive my right to pursue a motion for new trial or appeal.” (CR: 136).

In conclusion, from a review of the oral statements of the prosecutor and Buck’s counsel and the written plea papers, and under *Carson*, *Broadway*, and *Jones*, there was a *quid pro quo* expressly negotiated, namely, Buck’s waiver of his right to appeal for the State surrendering its right to a jury trial. That appears firmly and with certainty in the record. That is all that is required for a valid waiver of the right of appeal, and that is what occurred in this case. Consequently, Buck’s waiver of appeal was valid and should be enforced as the Court of Appeals correctly held. *See Buck*, 2018 WL 3654916, at \*7.<sup>5</sup>

## **2. Voluntariness of a open guilty plea and the burden of a defendant-appellant**

Nevertheless, in addressing Buck’s remaining grounds for review concerning the voluntariness of his guilty plea, it should be noted that because Buck entered an open plea of guilty, he waived any non-jurisdictional defects, other than the voluntariness of his plea. *See Young v. State*, 8 S.W.3d 656, 666-67

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<sup>5</sup> Because the Court of Appeals found the appeal waiver valid and enforceable, they should have dismissed the appeal, as should this Court.

(Tex.Crim.App. 2000); *Cooper v. State*, 45 S.W.3d 77, 87 (Tex.Crim.App. 2001)(Price, J., dissenting)(“It is true that in *Young* [citation omitted], we abrogated the *Helms* rule. However, the restrictive language in *Helms* did not preclude a challenge to the voluntariness of an open guilty plea. [Citations omitted]. When we abrogated *Helms*, we did not alter the ability of a non-plea bargaining defendant to challenge the voluntariness of his plea. [Citation omitted]. After *Helms*, and even after *Young*, a defendant who pleads guilty without the benefit of a plea bargain may challenge the voluntariness of his plea irrespective of the trial court’s permission.”); *Carrizales v. State*, No. 07-09-00271-CR, 2010 WL 861587, at \*2 (Tex.App. – Amarillo March 10, 2010, no pet.)(not designated for publication); *Lee v. State*, No. 02-08-00343-CR, 2009 WL 4114663, at \*1 (Tex.App. – Fort Worth November 25, 2009, no pet.)(not designated for publication).

In addressing the voluntariness of a guilty plea, a defendant who pleads guilty after having been properly admonished of his constitutional rights, who has knowingly and voluntarily waived those rights, and who has been admonished as required by our constitutions and art. 26.13 of the Code of Criminal Procedure, is presumed to have entered a voluntary and knowing plea. *Mitschke v. State*, 129 S.W.3d 130, 136 (Tex.Crim.App. 2004). In other words, receipt of the statutory

admonishments is prima facie evidence that the plea was knowing and voluntary. *Harrison v. State*, 688 S.W.2d 497, 499 (Tex.Crim.App. 1985); *Williams v. State*, 960 S.W.2d 758, 759 (Tex.App. – Houston [1<sup>st</sup> Dist.] 1997, pet. dism'd). When a defendant attests at his original plea hearing to the voluntary nature of his plea, a heavy burden is placed on him to later show a lack of voluntariness. *Williams*, 960 S.W.2d at 759-60; *Cantu v. State*, 988 S.W.2d 481, 484 (Tex.App. – Houston [1<sup>st</sup> Dist.] 1999, pet. ref'd); *Thornton v. State*, 734 S.W.2d 112, 113 (Tex.App. – Houston [1<sup>st</sup> Dist.] 1987, pet. ref'd). In other words, the burden then shifts to the defendant to show he did not understand the consequences of his plea. *Williams*, 960 S.W.2d at 759; *Hancock v. State*, 955 S.W.2d 369, 371 (Tex.App. – San Antonio 1997, no pet.). The record as a whole and the totality of the circumstances must be examined to determine the voluntariness of a guilty plea. *Hancock*, 955 S.W.2d at 370-71; *Dusenberry v. State*, 915 S.W.2d 947, 949 (Tex.App. – Houston [1<sup>st</sup> Dist.] 1996, pet. ref'd).

Here, the record shows that, after the colloquy about whether he was going to plead guilty or not, the judge asked Buck one more time if he wanted to proceed with an open plea of guilty, Buck stated that he did, and Buck's counsel stated that that was also her understanding. (RR2: 35). After a short recess, the plea was taken. (RR2: 36). Buck was sworn in as a witness. (RR2: 36). Buck was asked

to review SX1, the plea papers. (CR: 132-41; RR2: 36-37). Buck's counsel was asked if she had explained those documents to Buck, and she affirmed that she had and that he understood the documents and the consequences of giving up the rights detailed therein. (RR2: 36-37). Buck was asked if he was satisfied with his lawyer's representation; he replied that he was. (RR2: 37). Buck stated that he had never been found to be incompetent, and his lawyer stated that she believed Buck to be competent to proceed. (RR2: 37). Buck stated that no doctor or psychiatrist had ever found him to be mentally ill. (RR2: 37). The judge stated that, from his observations of Buck and the answers given, Buck was competent. (RR2: 37).

Buck entered his plea of guilty to the two-count indictment and stated that he was doing so freely and voluntarily:

THE COURT: Are you entering this plea of guilty freely and voluntarily?

BUCK: Yes, sir.

(RR2: 38).

The State summarized the evidence covering the elements of the allegations of the indictment. (RR2: 38-39). Introduced into evidence were the plea papers, SX1, and SX2, the complaint affidavit, and SX3, the DNA report showing Buck's DNA on the complainant's breast and belly. (RR2: 38-39; CR: 132-41). The

judge inquired if there was a plea agreement in the case, to which the prosecutor responded that there was not and that the only agreement was that the State agreed to waive jury trial, and Buck, in consideration of that, agreed to waive his appellate rights. (RR2: 39). Buck's counsel agreed that the representation by the prosecutor was correct, and she further stated: "[I] would like to state for the record that I explained to Mr. Buck that by signing these plea papers in this particular agreement, he understood he was waving his right to appeal in return for the State waiving its right to a jury trial." (RR2: 39). The judge announced that he accepted Buck's guilty plea and found him guilty of both counts of aggravated sexual assault. (RR2: 40).

A review of the plea papers (SX1) shows that Buck executed all the documents by his signature in the appropriate places. (CR: 132-38). He first acknowledged that he waived all of his rights given to a defendant in a criminal case. (CR: 132). Next, he admitted that he was guilty of both counts of aggravated sexual assault. (CR: 133). Next, he acknowledged the fact that if convicted, he would have to register as a sex offender. (CR: 134). Next, he acknowledged the admonishments about community supervision and parole. (CR: 135). Buck also affirmed: "[I]t is my desire to avoid trial and plead guilty." (CR: 137). On that same page, he again admitted to all of the allegations in the

indictment. (CR: 137).

Most importantly, for the issues raised in this appeal, Buck acknowledged the following:

I have been made aware of the consequences of entering a plea of guilty to the charges above and represent to the Court that **I have not been forced, coerced, or promised anything in return for entering my plea of guilty** and that I am mentally competent to enter said plea and waive my right to trial. **I waive these rights voluntarily and without reservation.**

\* \* \*

I, the undersigned Defendant, acknowledge that I have read this page and understand its contents and sign it for the purposes stated above.

/s/ Michael Buck

(CR: 136)(emphasis added). Finally, counsel for Buck joined in the waivers and acknowledged that she had explained all of Buck's rights to him, that he understood everything in the plea papers and the charges against him and what he had been admonished of, and that Buck freely and voluntarily waived his rights.

(CR: 138). That page was executed by Buck's counsel and Buck. (CR: 138).

When a defendant such as Buck attests as he did at his plea hearing to the voluntary nature of his plea, a heavy burden is placed on him to later show a lack of voluntariness. *See Williams*, 960 S.W.2d at 759-60; *Cantu*, 988 S.W.2d at 484;

*Thornton*, 734 S.W.2d at 113. After such attestations and waivers, the burden shifts to the defendant, Buck here, to show he did not understand the consequences of his plea. *Williams*, 960 S.W.2d at 759; *Hancock*, 955 S.W.2d at 371. From the oral and written record, Buck has failed to do so, such that his convictions should be affirmed.

### **3. Buck's specific challenges to the voluntariness of his guilty plea**

Buck complains that the judge misled him on the availability of jury punishment and that his sentences could be stacked. *See* (appellant's brief at 13-32). The record concerning these allegations shows that on the day of trial, before Buck was present, Buck's lawyer broached the subject about a plea of guilty, that Buck wanted to plead guilty, and asked if the judge would consider allowing Buck to do that. (RR2: 23-24). The judge replied that he could not stop Buck from pleading guilty. (RR2: 24). Buck's counsel noted that the State's offer had gone to 10 years' confinement the week before trial and asked if the judge was open to that sentence or could give some guidance. (RR2: 24). The judge responded that if Buck was coming to the court for punishment, it was an open plea and that he was not going to commit himself beforehand: "He pleas, it's an open plea." (RR2: 24). Counsel responded that Buck had agreed to an open plea, "he would do that," but she said she would reconfirm with Buck. (RR2: 24, 26).

Once Buck was present for trial, the judge inquired whether he was going to enter an open plea of guilty, to which Buck responded that he wanted to go to trial and defend himself. (RR2: 26-27). The judge told Buck that the jury panel that had been available had been used on another case, so Buck's trial would be continued until Friday. (RR2: 27). The judge told Buck that he had denied his lawyer's motion to withdraw and asked Buck's counsel to explain consecutive sentencing to Buck, as there was a two-count indictment. (RR2: 27). The record shows that counsel conferred with Buck. (RR2: 28).

The judge asked Buck if he had understood his lawyer's explanation of consecutive sentencing, commonly known as stacking. (RR2: 28). Buck stated that he did. (RR2: 28).

The judge informed Buck at first that if the jury found him guilty, the jury could assess 5-99 years or life on each count. (RR2: 30). The prosecutor reminded the judge that the punishment election after the 28.01 hearing was the judge, not the jury: "[H]e's going to the judge for punishment." (RR2: 30). The judge then corrected himself and informed Buck that he was looking at 5-99 years' confinement on each count, and since he had not elected for the jury to assess punishment, he (the judge) would assess punishment on each count and decide to stack the sentences or not: "[I] will decide whether to stack them or let them run

concurrent. I and I alone will make that decision.” (RR2: 30).

The following exchange occurred between the judge and Buck, starting with the judge commenting on the complaining witness testifying:

[THE COURT]: Okay. Mr. Buck, understand, I don’t know if she’s telling the truth or she isn’t. I’m merely telling you what the State anticipates she’s going to say. If the jury doesn’t believe her, good for you. If they do believe her, you have a problem because I am going to sentence you.

[THE DEFENDANT]: Well, in that case, Your Honor, I’d like to go ahead and take the open plea because I thought that the jury would have the right to assess the punishment.

[THE COURT]: No, sir. You are mistaken. The jury will tell you guilty or not guilty, count 1; guilty, not guilty count 2.

[THE DEFENDANT]: All right. Then may I go ahead and plea – an open plea, sir?

(RR2: 31).

The judge explained the situation and Buck’s options again:

These are your options, Mr. Buck. **One**, on Friday, we will empanel another jury panel. You will go to trial. **Two**, I cannot stop you from entering a plea to that jury, but the reality is, I will – if you enter a plea of guilty to the jury, I will instruct them to find you guilty, they will do so, and then you come to me for punishment. So I don’t consider that a viable option. **Or two** [sic], you plea guilty today on what we call an open plea, meaning there is no recommendation from the State of Texas to bind the defense, and I will assess an appropriate punishment.

[THE DEFENDANT]: All right. I'd like to go ahead and plea to the open plea, sir.

(RR2: 33-34)(emphasis added). The judge asked Buck one more time if he wanted to proceed with an open plea of guilty, and Buck stated that that was his understanding, and Buck's counsel stated that that was also her understanding. (RR2: 35).

### **a. Stacking**

So long as the law authorizes the imposition of cumulative (stacking) sentences, a trial judge has absolute discretion to stack sentences. *Nicholas v. State*, 56 S.W.3d 760, 765 (Tex.App. – Houston [14<sup>th</sup> Dist.] 2001, pet. ref'd). Under article 42.08 of the Code of Criminal Procedure, the trial judge has the discretion to cumulate the sentences for two or more convictions. *Id.* at 764; TEX. CODE CRIM. PROC. art. 42.08(a). That discretion is limited by Penal Code section 3.03(a), however, if all of the offenses occurred in a single criminal episode. *Nicholas*, 56 S.W.3d at 765 n.4; TEX. PENAL CODE §3.03(a). Criminal episode means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person, where the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan, or the offenses are the repeated commission of the same or similar offenses. TEX. PENAL

CODE §3.01. When a defendant is prosecuted in “a single criminal action,” that is, whenever allegations and evidence of more than one offense arising out of the same criminal episode, as that term is defined in Chapter 3 of the Penal Code, are presented in a single trial or plea proceeding, whether pursuant to one charging instrument or several, the provisions of Section 3.03 then apply. *LaPorte v. State*, 840 S.W.2d 412, 415 (Tex.Crim.App. 1992), *overruled on other grounds by, Ex parte Carter*, 521 S.W.3d 344 (Tex.Crim.App. 2017). The trial court’s general authority under article 42.08 to order consecutive sentences is statutorily limited by section 3.03 whenever a single criminal action arising out of the same criminal episode occurs, whether based upon a single charging instrument or several charging instruments. *Id.*

Here, both limitations of section 3.03(a) applied, as both offenses were aggravated sexual assault committed on the same day against the same victim. (CR: 8-9). Thus, the judge was incorrect when he stated that the sentences could be stacked. The only exception would have been if the victim had been younger than 17. *See* TEX. PENAL CODE §3.03(b)(2)(A). The record does show that the victim’s age (19 or at least 18 at the time of the offense) was not disclosed until that evidence was developed at the punishment hearing the day after the guilty plea, making the victim either 18 or 19 at the time of the offenses, (RR2: 68), so

that stacking was theoretically a possibility until that later testimony demonstrated that the victim was older than age 17 at the time of the offenses, thereby aging the victim out of the possible stacking of Buck's crimes. Thus, when the trial judge first mentioned stacking, it was unknown in the record that the victim had "aged out" of a stacking possibility for the two offenses.

But the judge's incorrect statement that the sentences could be stacked did not imply that he would stack the sentences. He merely stated that that was an option. And, in fact, he did not stack the sentences and sentenced Buck to 23 years' confinement, a reasonable sentence for two sexual-assault offenses at gunpoint.

Moreover, the only evidence in the record, despite Buck's protestations to the contrary, *see* (appellant's brief at 14-15, 17-18, 26, 29, 31), that his plea was involuntary due to the incorrect stacking admonishment is the incorrect admonishment itself. When that is the case, that alone is insufficient, and the defendant fails to demonstrate that his guilty plea was involuntary. *See Martinez v. State*, 981 S.W.2d 195, 197 (Tex.Crim.App. 1998) ("The only support in the record for appellant's contention that his plea was involuntary is the incorrect admonishment form. The record contains no evidence which tends to indicate that appellant was actually harmed or misled in making his determination to enter a

guilty plea. We find that appellant has not demonstrated that he relied on the incorrect portion of the admonishment in choosing to enter a plea of guilty. Thus, he fails to sustain his claim that his plea was not voluntary.”); *Ex parte Gibauitch*, 688 S.W.2d 868, 869-73 (Tex.Crim.App. 1985)(holding involuntariness of guilty plea not shown where defendant received incorrect admonishment on punishment, but was sentenced within correct applicable range, such that defendant’s bare claim that he would have gone to trial if he had known of correct lesser range of punishment, held unlikely, and bare claim did not support such assertion especially in view of fact that guilty plea was an open plea of guilty).

The law to this day is accurately stated in *Ex parte Gibauitch*:

[W]hen the record shows that the trial court gave an admonishment that was incomplete or incorrect, there is a *prima facie* showing of a knowing and voluntary plea of guilty. The burden then shifts to the defendant to show that he entered the plea without understanding the consequences of his action and thus was harmed.

*Ex parte Gibauitch*, 688 S.W.2d at 871. Just Buck saying he would not have pled guilty but for the incorrect admonishment did not make it so. *See* (appellant’s brief at 14-15, 17-18, 26, 29, 31). And his bare claim that he was misled by the incorrect stacking admonishment is all the evidence that Buck provides. That is not evidence that supports a claim of an involuntary plea. *See Martinez*, 981 S.W.2d at 197; *Ex parte Gibauitch*, 688 S.W.2d at 869-73.

The record does not show that the incorrect admonishment about stacking caused Buck to plead guilty. Although the trial judge was ultimately mistaken about his authority to stack the sentences, he correctly advised Buck about the range of punishment and the consequences of his plea. Thus, Buck had to show that he was misled into pleading guilty and harmed by the inaccurate stacking admonishment. *Martinez*, 981 S.W.2d at 197; *Ex parte Gibauitch*, 688 S.W.2d at 871. But the record does not show that the trial court's erroneous admonishment about stacking played any part in Buck's decision to plead guilty. Although Buck speculates in his brief that he was under the impression that his sentences would be stacked, *see* (appellant's brief at 14-15, 17-18, 26, 29, 31), because the record does not show what Buck actually thought about stacking, and even though the trial judge might have thought stacking was permissible, there is no evidence in the record that Buck thought so, too. And it should be remembered that the trial judge did not in actuality stack Buck's sentences. Consequently, because Buck has failed to show that the incorrect admonishment about stacking caused him to plead guilty, he has not shown that his guilty plea was involuntary and should be set aside. *See Martinez*, 981 S.W.2d at 197; *Ex parte Gibauitch*, 688 S.W.2d at 869-73.

## **b. Election of punishment**

Buck also complains that the trial judge took away his right for the jury to assess punishment. *See* (appellant’s brief at 13, 15, 17-20, 25-26, 29, 31). If a 28.01 pretrial hearing is held, the defendant is required to file his pleadings – including his election to have the jury assess his punishment – within the time prescribed by article 28.01, that being seven days before the hearing. *Postell v. State*, 693 S.W.2d 462, 464 (Tex.Crim.App. 1985). If no such timely election is made, the default is for the judge to assess punishment in the case. *See* TEX. CODE CRIM. PROC. art. 37.07(2)(b)(2). Buck claims, however, that *Postell* is no longer the law and that under the current version of article 37.07, the election can be made any time up to the commencement of *voir dire* regardless of any article 28.01 hearing, and such change in the law is represented by cases such as *In re State ex rel. Tharp*, 393 S.W.3d 751, 756 (Tex.Crim.App. 2013)(orig. proceeding) (“[A]rticle 37.07 now provides that the defendant must elect a jury for punishment before the commencement of voir dire....”). *See* (appellant’s brief at 19). This contention is not correct.

Under article 28.01, the pre-trial hearing envisioned by that article includes determining various listed matters to include pleadings of the defendant. *See* TEX. CODE CRIM. PROC. art. 28.01§1(2). A pleading of the defendant includes,

specifically: “An election, if any, to have the jury assess the punishment if he is found guilty.” TEX. CODE CRIM. PROC. art. 27.02(7). Thus, if there is an article 28.01 hearing, as there was in this case, one of the things to be determined is whether the defendant has made an election to have the jury assess punishment. *See* TEX. CODE CRIM. PROC. art. 28.01§1(2); TEX. CODE CRIM. PROC. art. 27.02(7). And that election must be in writing. *See* TEX. CODE CRIM. PROC. art. 37.07(2)(b). Where no written election is filed, the trial court has the duty to assess punishment. *Toney v. State*, 586 S.W.2d 856, 858 (Tex.Crim.App. 1979).

The reason that Buck claims that *Postell* is no longer the law is that, since *Postell* was decided (July 24, 1985), article 37.07 has been amended, effective September 1, 1985, to provide that a defendant must elect a jury for punishment before the commencement of *voir dire* instead of after a verdict of guilty. *Tharp*, 393 S.W.3d at 756 n. 20; TEX. CODE CRIM. PROC. art. 37.07(2)(b)(historical notes). That change in the statute in no way changed the law in *Postell* that if there is an article 28.01 hearing, as in this case, the defendant must make his punishment election as part of his pleadings within the time prescribed by article 28.01§2, namely, seven days before the hearing. *Postell*, 693 S.W.2d at 464; TEX. CODE CRIM. PROC. art. 28.01§2. What Buck fails to mention is that this Court, in *Postell*, harmonized article 28.01 and article 37.07, and reading that in conjunction

with *Tharp*, article 37.07's election requirement after a verdict of guilty (before September 1, 1985) and before commencement of *voir dire* (post September 1, 1985) gives effect to both statutes by the simple expedient of confining the effect of article 37.07§2(b)(2) to cases in which there has been no article 28.01 pretrial hearing. *See Tharp*, 393 S.W.3d at 756; *Postell*, 693 S.W.2d at 464.

Consequently, *Postell* is still the law, contrary to Buck's contention.

The only misstatement by the trial judge in this regard was as follows:

“[T]he reality is, I will – if you enter a plea of guilty to the jury, I will instruct them to find you guilty, they will do so, and then you come to me for punishment.” (RR2: 33). Despite never making a punishment election, which normally would default to the trial judge assessing punishment, if Buck had pled guilty to the jury, under article 26.14 of the Code of Criminal Procedure, the jury would have assessed punishment. *See Tharp*, 393 S.W.3d at 754-58; TEX. CODE CRIM. PROC. Art. 26.14. Thus, this statement by the judge was incorrect.

Nevertheless, since both parties waived jury trial under the bargain mentioned above, article 26.14's requirement of jury punishment did not come into play, and the trial judge assessed punishment since Buck never made a written election for the jury to assess punishment. *See also* TEX. CODE CRIM. PROC. art. 26.14 (providing that jury does not assess punishment if jury trial is waived);

*Toney*, 586 S.W.2d at 858. And just as in the stacking analysis set forth above, there is no evidence in the record that any misstatement in this regard caused Buck to plead guilty.

The record does not show that the incorrect statement about sentencing if he pled guilty to a jury caused Buck to plead guilty. Buck had to show that he was misled into pleading guilty and harmed by the inaccurate statement. *See Martinez*, 981 S.W.2d at 197; *Ex parte Gibauitch*, 688 S.W.2d at 871. But the record does not show that the trial court's incorrect statement about sentencing played any part in Buck's decision to plead guilty. Again, just saying that it did does not make it so. Consequently, his guilty plea should not be invalidated on this basis, either.

Moreover, it is evident that Buck was never serious about electing to have the jury assess his punishment because, as mentioned, he never filed an election for punishment ever, much less by the 28.01 deadline. *Toney*, 586 S.W.2d at 858 (“[W]here no election is filed, the trial court has the duty to assess punishment.”). And then, during the plea proceedings, Buck never objected to the judge assessing punishment, thus further waiving the right to complain about his guilty plea. *Jones v. State*, No. 06-16-00110-CR, 2017 WL 2264840, at \*2 (Tex. App. – Texarkana May 24, 2017, pet. ref'd)(not designated for publication)(“[E]ven though Jones had previously elected in writing to have the jury assess punishment,

he failed to object when the trial court dismissed the jury and assessed punishment. He also failed to take issue with statements made at other times that he had chosen to have the court assess punishment. In the absence of evidence to the contrary, we must presume that Jones waived his statutory right.”); *Insardi v. State*, No. 05-00-01722-CR, 2002 WL 55152, at \*3 (Tex.App. – Dallas January 16, 2002, no pet.)(not designated for publication)(failure to object to judge setting punishment waived claim of error in that regard).

Incidentally, Buck also complains that the judge threatened him with a longer sentence if he went to trial. *See* (appellant’s brief at 25). This claim appears to be in response to the judge’s comment that if Buck did go to jury trial, and the jury believed the victim, he was going to have a problem because the judge would sentence him. (RR2: 31). But this is simply the judge telling Buck that if the jury believed the victim, he was going to be found guilty, and the problem was he was going to go to prison if that happened, as the judge also told him the five-year prison sentence was off the table as far as the judge was concerned. (RR2: 33). At some point, there had been a five-year confinement offer, as noted by Buck’s counsel on September 6<sup>th</sup>. (RR2: 20). However, by the time of trial on September 19<sup>th</sup>, the judge said he would not take a five-year offer, and Buck decided to enter his open plea knowing that, specifically stating that he

would go with an open plea after being told that by the judge. (RR2: 33, 35).

Thus, the judge did not involve himself in any plea-bargaining process and did not tell Buck how his sentence would go, just that there would be a prison sentence if the jury found him guilty, as that would be a problem for any defendant who the jury found guilty, not just Buck, and if he took the open plea, the sentence would be more than five years. None of this coerced Buck's plea, and instead actually allowed him to make his open-plea decision with his eyes open.

Buck also complains that there was evidence that his plea was not voluntary because the judge wanted him to plead guilty. *See* (appellant's brief at 25). What the record shows is that the judge merely gave Buck various choices and required Buck to make a choice about how he wished to proceed. The judge gave Buck the options of a full jury trial on the issue of guilt/innocence, pleading guilty to the jury, or doing an open plea before the judge. (RR2: 33).

#### **4. Conclusion**

In conclusion, what is presented to this Court is a defendant who specifically orally affirmed at his guilty plea that his guilty plea was voluntarily made:

THE COURT: Are you entering this plea of guilty freely and voluntarily?

BUCK: Yes, sir.

(RR2: 38).

And Buck also confirmed the voluntariness of his guilty plea in writing:

“[I]t is my desire to avoid trial and plead guilty.” (CR: 137). Buck also stated in writing:

**[I] have not been forced, coerced, or promised anything in return for entering my plea of guilty...I waive these rights voluntarily and without reservation.**

\_\_\_\_\_/s/ Michael Buck

(CR: 136)(emphasis added).

Buck, who was properly admonished under article 26.13 of all of his rights, was presumed to have entered a voluntary and knowing plea. *Mitschke*, 129 S.W.3d at 136; *Harrison*, 688 S.W.2d at 499; *Williams*, 960 S.W.2d at 759. Buck has failed to overcome the heavy burden placed on him to show a lack of voluntariness. *Williams*, 960 S.W.2d at 759-60; *Cantu v. State*, 988 S.W.2d at 484; *Thornton*, 734 S.W.2d at 113. And the record supports the voluntariness of Buck’s guilty plea. *Hancock*, 955 S.W.2d at 370-71; *Dusenberry*, 915 S.W.2d at 949. For all reasons stated, the Court of Appeals correctly determined that Buck’s plea was voluntarily entered. *Buck*, 2018 WL 3654916, at \*7. Buck’s grounds for review are without merit and should be overruled.

**PRAYER**

WHEREFORE, the State prays that this Court affirm the judgment and opinion of the Court of Appeals, and further that appellant's convictions and sentences be affirmed.

Respectfully submitted,

JAIME ESPARZA  
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/s/John L. Davis

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ATTORNEYS FOR THE STATE

### **CERTIFICATE OF COMPLIANCE**

The undersigned does hereby certify that the foregoing document contains 9,108 words (taking out the caption, table of contents, index of authorities, statement of the case, signature, proof of service, certification, and certificate of compliance per rule of appellate procedure 9.4(i)(1)).

/s/John L. Davis  
JOHN L. DAVIS

### **CERTIFICATE OF SERVICE**

The undersigned does hereby certify that he has registered to e-file documents through an EFSP, and the undersigned has on this day, February 15, 2019, served a copy of the State's brief through the EFSP on the attorney for appellant, that being: Nicholas C. Vitolo, El Paso County Courthouse #501, 500 E. San Antonio, El Paso, Texas 79901, e-mail at [nvitolo@epcounty.com](mailto:nvitolo@epcounty.com), and also on February 15, 2019, a copy of the State's brief was served through the EFSP on the State Prosecuting Attorney: Stacey M. Soule, 209 W. 14<sup>th</sup> St., Austin, TX 78701, email: [information@spa.texas.gov](mailto:information@spa.texas.gov).

/s/John L. Davis  
JOHN L. DAVIS